THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C. 140 Allens Creek Road Rochester, NY 14618 Complainant, v. TOWN OF SHREWSBURY ELECTRIC LIGHT PLANT 100 Maple Avenue Shrewsbury, MA 01545-5398 Respondents.	D.T.E. 01-70

MOTION OF FIBERTECH NETWORKS, LLC FOR RECONSIDERATION AND CLARIFICATION

Fibertech Networks, LLC ("Fibertech") moves that the Department reconsider the Interlocutory Order on Motion of Fiber Technologies Networks For Summary Judgment and on Appeals of Fiber Technologies Networks From Hearing Officer Rulings on Motions to Compel Responses to Information Requests issued December 24, 2002 in this docket (the "*Interlocutory Order*"). In the *Interlocutory Order*, the Department held that "a company that is in the business of transmission of intelligence is 'authorized to construct lines or cables upon, along, under and across the public ways'" for the purposes of G.L. c. 166, § 25 (and therefore a "licensee" within the meaning of that statute) "after the board of selectmen in the town where the attachments in question are to be located has granted a location for the line." *Id*. at 22. By requiring municipal grants of location ***before*** a telecommunications provider can obtain even a pole attachment agreement, much less specific pole attachment licenses, the Department inadvertently overlooks

uncontroverted evidence in the record about industry custom and practice. The Department's holding would alter this custom and practice in ways that are unworkable, that create unreasonable entry barriers, and that are not required by reasonable reading of G.L. c. 166, §§ 21 and 22.

The Department also held that "dark fiber is a facility used in the transmission of intelligence" and qualifies as an "attachment" within the meaning of G.L. c. 166, § 25. *Id*. at 28. This is the case regardless of whether the dark fiber is provisioned without electronics and remains unlit for an unspecified period or whether the dark fiber provider operates as a common carrier. *Id*. at 28, 20. Despite this ruling, the Department found there is some factual dispute whether Fibertech is in the business of transmission of intelligence, and that this dispute requires a hearing. Fibertech seeks clarification as to just what facts are in dispute given the Department's holding on the pivotal issue whether dark fiber is "wire or cable for the transmission of intelligence."

If there is purportedly some issue whether Fibertech actually is in the business of providing dark fiber, then the Department's decision incorrectly applies summary decision standards. To require a hearing, there must be a ***genuine*** issue of fact. It is not enough to allege a dispute; rather, there must be some concrete basis to establish that a dispute exists. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714 (1991). SELP has failed to meet its burden to oppose a motion for summary decision by coming forward with some concrete basis to suggest a genuine dispute whether Fibertech provides dark fiber. Authorizing SELP to go fishing for some as-yet-unarticulated basis to oppose Fibertech's right to attachments (when the Department has already rejected the sole basis SELP articulated) establishes a dangerous

precedent. It is an invitation to incumbent utilities to poke into the business plans and customer relationships of their fledgling competitors. The resultant threat to competitive entry is patent.

For these reasons, more fully developed below, the Department should reconsider the *Interlocutory Order* and issue summary decision in Fibertech's favor in full, and order SELP to enter into a nondiscriminatory pole attachment agreement with Fibertech at standard rates and terms.

ARGUMENT

I. The *Interlocutory Order* Inadvertently, Unworkably, And Unnecessarily Changes Industry Custom And Practice.

A. The *Interlocutory Order* Overlooks Industry Custom And Practice.

The Department's "well settled" policy on reconsideration permits reconsideration on the basis that the Department's treatment of an issue was the result of mistake or inadvertence. *Massachusetts Electric Co.*, D.P.U. 90-261-B at 7 (1991); *New England Telephone and Telegraph Company*, D.P.U. 86-33-J at 2 (1989); *Boston Edison Company*, D.P.U. 1350-A at 5 (1983). The *Interlocutory Order* implicates this standard for reconsideration because it overlooks evidence in the record that the custom and practice in the telecommunications industry is to have pole attachment agreements and licenses in place *before* obtaining municipal grants of location.

The prefiled testimony of Frank Chiaino, Fibertech's Chief Operating Officer with over 30 years' experience in the build-out of cable television and telecommunications systems, stated:

> **Q:** Does Fibertech have pole attachment agreements with utilities in Massachusetts?
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> **A:** Yes. Fibertech has such agreements with Verizon, Massachusetts Electric (National Grid), Western Massachusetts Electric, and the municipal lighting

plants of Templeton and Holden. The agreements with the Templeton and Holden light plants are tri-party agreements with Fibertech and Verizon.

Q: Have these utilities required that Fibertech obtain local municipal authorizations prior to obtaining attachment agreements?

A: No.

Q: Has that ever been your experience with other utilities?

A: The normal pattern for Fibertech in other locations and in my cable experience is to sign a master attachment agreement with utilities establishing rates, terms, and conditions for access to poles, conduits, and rights of way; and then apply for specific licenses under the agreement for specific locations. Applying for permits from local governments comes after private sector agreements are in place.

Prefiled Testimony of Frank Chiaino, p. 7 (filed November 9, 2001). The *Cablevision v. Public Improvements Commission*[1] decision cited in the *Interlocutory Order* reflects this practice: under the City of Boston Telecommunications Policy, telecommunications providers are ***required*** to have their private agreements in place before seeking public authority for locations in the public ways. 184 F.3d at 91 (1st Cir. 1999). SELP submitted nothing to controvert this testimony and background.

This custom and practice makes sense. As the Department must be aware from prior experience with pole attachments[2] and as reflected in the Chiaino testimony, before they can obtain pole attachment licenses, cable operators and telecommunications providers must enter into a pole attachment agreement with a utility that establishes the terms and conditions on which to obtain licenses to attach to specific poles anywhere in the utility's service area. It is only by applying specific pole attachment licenses pursuant to such an agreement that the attaching entities then can be in a position to attach to any given pole (or conduit). Before such licenses

[1] 184 F.3d 88 (1st Cir. 1999).

[2] *See, e.g.*, In the Matter of Application of Verizon New England, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts, F.C.C. Docket No. 01-9, *Evaluation of the Massachusetts Department of Telecommunications and Energy*, (filed February 6, 2001).

can be issued, the agreements require pole surveys and estimates of make-ready work. Only once this preliminary work is done can the attaching entity finalize a route – and thus know what grants of location to apply for.[3]

Requiring grants of location before obtaining a pole attachment agreement places an unreasonable burden on both new entrants and local governments, because it would require them to address grants of location before the work is done to determine an actual route. Local governments should not have to devote scarce government resources on a game of Pin-The-Tail-on-The-Donkey, and new entrants need some certainty and efficiency in business planning rather than seeking grants of location that may prove unnecessary. A hit-or-miss process also invites the sort of Alphonse-and-Gaston act that has occurred in Shrewsbury as the utility and the municipality each wait for the other to go first.

It is no wonder, then, that more than two years after Fibertech first explored placing lines in Shrewsbury, it is not past square one. In this case, SELP has not even entered into a pole attachment agreement establishing terms and conditions that would enable Fibertech to apply for pole attachments anywhere. In turn, the parties have no basis at all on which to proceed to the pole-surveys, make-ready estimates, and other planning necessary to determine specific locations where Fibertech actually needs grants of location. The *Interlocutory Order* puts the cart in front of the horse.

B. Industry Custom And Practice Are Not Inconsistent with G.L. c. 166, §§ 21 and 22.

The Department correctly recognizes that G.L. c. 166, § 21 authorizes companies incorporated for the transmission of intelligence to place poles and wires in the public ways.

[3] A grant of location pursuant to G.L. c. 166, § 22 is the authority for a specific individual location for construction or attachment of facilities "where it is proposed to construct such line," not a general grant of authority to erect facilities anywhere in the city or town comparable to a cable television license or a common carrier certificate.

Interlocutory Order at 20. The Department likewise is correct that G.L. c. 166, § 22 requires that such a company obtain local authority for specific locations to insure that its facilities do not "incommode" the public ways. *Id.* at 21, 22. Simply because a grant of location is required before construction can be performed actually attaching to a pole, it does not follow that such a grant is required before the attaching entity can obtain a license to attach, much less before it can obtain even an agreement that fixes the terms and conditions on which it may seek licenses within a given area.

All Fibertech is seeking here is the ***right*** to attach to SELP poles or conduits. The *Interlocutory Order* appears to assume that the grant of a pole attachment license confers actual access, and not just the right of access as against the utility. Once that right is granted, however, Fibertech will still need to obtain licenses for specific attachments and grants of location, as well as other local permits such as construction permits or street cut permits from the public works department. So long as such local permits are required, there is no inconsistency with G.L. c. 166, §§ 21 and 22.

Thus, the Department's concern that "[i]f a "licensee" should be generally authorized to construct lines across public ways, even without receiving specific grants of location, the utility conceivably could be obligated to grant the licensee nondiscriminatory access to its poles under G.L. c. 166, § 25A, while the licensee still would not be authorized to construct specific lines in public ways under G.L. c. 166, § 22, to be attached to those poles,"[4] is illusory. It also gives rise to an inconsistency with federal law. In amending § 25A and the pole attachment regulations in 1997, both the Legislature and the Department acted to make these provisions conform with Section 224 of the Telecommunications Act of 1996. 47 U.S.C. § 224(c) permits states to certify

[4] *Interlocutory Order* at 22.

that they regulate rates, terms, and conditions and access to poles, ducts, conduits, and rights-of-way, and preempts FCC jurisdiction "in any case where such matters are regulated by the state." "Such matters" refers in part to "subsection (f)," 47 U.S.C. § 224 (f) added by the 1996 Act, which establishes the obligation of a utility to provide "a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Section 224 requires utilities to provide all telecommunications providers with nondiscriminatory access to poles, conduits, and rights of way without reference to local right-of-way permitting.[5] If the Department did not regulate nondiscriminatory access to these facilities on the part of telecommunications carriers, the FCC would retain jurisdiction to regulate in Massachusetts. The *Interlocutory Order* suggests that one could be a "telecommunications provider" under §224, but not a "licensee" under Massachusetts law. If so, the *Interlocutory Order* does not provide the same access that §224 accords and creates circumstances in which the FCC would have jurisdiction. This is contrary to the preemptive purpose of the Department's regulations.

Because such consequences are not discussed in the *Interlocutory Order*, they must be unintended, the inadvertent result of overlooking uncontroverted evidence of industry custom and practice rather than a considered decision to change the custom and practice.

II. Because The Department's Holding That Dark Fiber Is A Facility Used for Transmission of Intelligence Appears to Resolve The Dispute in This Case, It Is Not Clear What Remains to Be Heard.

The crux of this case was SELP's contention that Fibertech is not in the business of transmitting intelligence because it "appears to be in the business of constructing dark fiber and

[5] Right-of-way permitting is addressed in 47 U.S.C. § 253, which preserves local authority, provided it is nondiscriminatory and competitively neutral and does not impose unreasonable barriers to entry. Thus, administration of the scheme of grants of location under G.L. c. 166 §§ 21 and 22 must conform to these federal requirements.

leasing that fiber to other companies." *Interlocutory Order* at 8. The Department resolved this central issue in Fibertech's favor by ruling "[Fibertech's] dark fiber is a "wire or cable for transmission of intelligence by telegraph, telephone or television," and thus, we hold that dark fiber qualifies as an "attachment" under G.L. c. 166, § 25A." *Id*. at *28.* Nevertheless, the Department stated that it will proceed "on the sole issue whether Fibertech is incorporated for the transmission of intelligence." *Id.* at 24-25. Fibertech seeks clarification of this ruling because it is at a loss as to what further it must establish other than that it provides dark fiber.

If the Department perceives an issue of fact that requires hearing based on SELP's contention that the record is unsubstantiated as to the nature of Fibertech's business (see *id*. at 15), this incorrectly applies summary decision standards. The leading statement of Massachusetts summary judgment standards is *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991). In that case, the Supreme Judicial Court declared that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses," and the failure of the party opposing summary judgment to "show with admissible evidence the existence of a dispute as to material facts" was fatal to its position. *Id*. at 712-713.

Despite a factual record that established a factual basis to find Fibertech is engaged in transmission of intelligence, however, the *Interlocutory Order* does not hold SELP to this burden. Fibertech submitted admissible evidence that it is in the business of providing dark fiber. *See* Chiaino Testimony. Once Fibertech established this factual basis for judgment, the burden shifted to SELP to "show with admissible evidence the existence of a dispute as to material facts." *Id.* at 711 (citing *Godbout v. Cousens*, 396 Mass. 254, 261 (1985)). By finding some disputed issue of fact where SELP has failed to identify specific material disputes, the Department has afforded SELP a standard of interpretation more favorable than warranted. *See*

Longval v. Maloney, Civ. No. 01-11458-GAO (D. Mass. 2002), (citing *Haines v. Kerner*, 404 US. 519, 520 (1972)).[6]

Although the *Interlocutory Order* states that the Chiaino testimony is "not corroborated," *id.* at 24 n. 22, Fibertech has no burden to "corroborate" uncontroverted testimony. SELP seeks to put Fibertech on proof, but a party cannot do so on summary decision; rather it must come forward with some credible factual basis to question that ***evidence***. *Id.* at 714. It is well settled that factual issues on summary judgment must be based on evidence, not mere allegations. Mass. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).[7] SELP's claim that there remain factual issues rests on the premise that the record in this case only includes "unsubstantiated and vague statements regarding the very general nature of Fibertech's business, products, services and customers, and that Fibertech is nothing more than a construction company building dark fiber on a speculative basis with no customers currently paying for any 'service' or leasing any fiber." *Interlocutory Order* at 15, (quoting *SELP Response to Fibertech Motion for Summary Judgment*, at 2, 10). SELP's fantastic premise is simply too speculative to amount to a "genuine" issue for purposes of summary judgment; "[t]he mere existence of a scintilla of evidence" is not enough to defeat summary judgment. *Id.* at 252.

SELP's vague suggestions of wholly irrational behavior are not germane enough to present a "material" issue; moreover, a factual dispute is "material" only if it "might affect the outcome" of the suit under governing law … ." *Anderson*, 477 U.S. at 248; *accord, e.g.*,

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[6] In civil practice, a party moving for summary judgment must submit a statement of facts it contends are undisputed. The opposing party in turn must provide "a concise statement of any additional facts as to which the opposing party contends there is a genuine issue to be tried" and, if it fails do so, the facts stated by the moving party" shall be deemed to have been admitted …." Superior Court Rule 9A(b)(5).

[7] Just as the Massachusetts Rules of Civil Procedure are "instructive" before the DTE, 220 C.M.R. § 1.06(b)(1), the Massachusetts rules are "patterned after federal rules …" and are interpreted "consistently with the construction given their federal counterparts … ." *Solimene v. B. Gravel & Co., KG*, 399 Mass. 790, 800 (1987). The SJC followed the Supreme Court's 1986 summary judgment "trilogy" in *Kourouvacilis v. General Motors Corp*., 410 Mass. 706 (1991).

National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995). SELP fails to articulate how any of the "issues" it raises or information it purportedly seeks will inform the Department's decision or change the outcome of the case.[8] The Department already has rejected the materiality of SELP's stated theories that Fibertech is not a "licensee" because it does not operate as a common carrier and provides unlit fiber. *Interlocutory Order* at 20-21, 29. In this light, SELP's discovery is simply casting about for some other theory that SELP has not articulated – in short, a classic fishing expedition.

By finding that there are some sort of issues of fact to hear and endorsing the resultant discovery, the Department gives a roving commission to utilities to demand that their competitors disclose business plans, customer lists, and other competitively sensitive information before they can obtain even a pole attachment agreement. No telecommunications provider should be forced to turn over customer lists, agreements, and information about customers' business as a threshold for obtaining attachments. *See Marcus Cable Associates, L.P.*, FCC P.A. No. 96-002, ¶¶ 22, 24 (released July 21, 1997) (cable operator "is under no obligation to [utility] to disclose any information regarding the lease of its capacity to third parties," and pole attachment condition requiring "disclosure of the names of [operator's] nonvideo transmission customers" is unjust and unreasonable). Moreover, although Fibertech is providing service in other states, a brand new entrant may face a burden it could not meet if it must demonstrate actual service. If a new entrant must have customers doing business before it can obtain pole attachments, new facilities-based entry would be impossible.

The Department has resolved the central premise on which SELP denied access to its poles. Residual issues of fact there may be. But there are no genuine or material issues that

[8] SELP argues that the leases and agreements are "central" to the question whether Fibertech is engaged in transmission of intelligence. *Interlocutory Order* at 41. Nowhere is there any explanation of what it seeks to show on this issue.

require a hearing and warrant SELP's fishing through its competitors' records for some alternative basis on which to oppose Fibertech's request for pole attachments.

CONCLUSION

For these reasons, the Department should reconsider the *Interlocutory Order* and issue summary decision in Fibertech's favor in full, and order SELP to enter into a nondiscriminatory pole attachment agreement with Fibertech at standard rates, terms, and conditions.

Respectfully submitted,

Cameron F. Kerry, BBO# 269660
Kimberly C. Collins, BBO#643405
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Charles B. Stockdale
Robert T. Witthauer
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, New York 14618
(585) 697-5100

Attorneys for Fiber Technologies Networks, L.L.C.

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